



## **DEPARTMENT OF JUSTICE**

### **Bureau of Prisons**

### **28 CFR Parts 523 and 541**

**[BOP-1176R]**

**RIN 1120-AB76**

### **FSA Time Credits**

**AGENCY:** Bureau of Prisons, Justice.

**ACTION:** Notice of proposed rulemaking; reopening of comment period.

**SUMMARY:** On November 25, 2020, the Bureau of Prisons (Bureau) published a proposed rule to revise its procedures regarding time credits as authorized by the First Step Act of 2018 (FSA), hereinafter referred to as “FSA Time Credits.” The comment period for that rule closed on January 25, 2021. The Bureau is reopening the comment period for an additional 30-day period to request further public comment on the applicability of the FSA Time Credits to D.C. Code Offenders.

**DATES:** The comment period for the proposed rule published November 25, 2020, at 85 FR 75268, is reopened. Electronic comments must be submitted, and written comments must be postmarked, no later than 11:59 p.m. on [INSERT 30 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER].

**ADDRESSES:** Please submit electronic comments through the [regulations.gov](https://www.regulations.gov) website, or mail written comments to the Rules Unit, Office of General Counsel, Bureau of Prisons, 320 First Street NW, Washington, DC 20534.

**FOR FURTHER INFORMATION CONTACT:** Sarah Qureshi, Office of General Counsel, Bureau of Prisons, phone (202) 353-8248.

### **SUPPLEMENTARY INFORMATION:**

#### Posting of Public Comments

Please note that all comments received are considered part of the public record and made available for public inspection online at [www.regulations.gov](http://www.regulations.gov). Such information includes personal identifying information (such as your name, address, etc.) voluntarily submitted by the commenter.

If you want to submit personal identifying information (such as your name, address, etc.) as part of your comment, but do not want it to be posted online, you must include the phrase “PERSONAL IDENTIFYING INFORMATION” in the first paragraph of your comment. You must also locate all the personal identifying information you do not want posted online in the first paragraph of your comment and identify what information you want redacted.

If you want to submit confidential business information as part of your comment but do not want it to be posted online, you must include the phrase “CONFIDENTIAL BUSINESS INFORMATION” in the first paragraph of your comment. You must also prominently identify confidential business information to be redacted within the comment. If a comment contains so much confidential business information that it cannot be effectively redacted, all or part of that comment may not be posted [www.regulations.gov](http://www.regulations.gov).

Personal identifying information identified and located as set forth above will be placed in the agency's public docket file, but not posted online. Confidential business information identified and located as set forth above will not be placed in the public docket file. If you wish to inspect the agency's public docket file in person by appointment, please see the FOR FURTHER INFORMATION CONTACT paragraph.

### Discussion

On November 25, 2020, the Bureau of Prisons (Bureau) published a proposed rule to revise its procedures regarding time credits as authorized by the First Step Act of 2018 (FSA) (85 FR 75268). The public comment period closed on January 25, 2021. The Bureau received more than two hundred and fifty responses to the publication of the proposed rule. However, upon review of the comments, it is unclear to the Bureau whether commenters had fully considered the issue of whether D.C. Code offenders in Bureau of Prisons custody are eligible for time credits under 18 U.S.C. 3632(d)(4), as added

by the FSA.

The November 25, 2020, proposed rule would allow only an “eligible inmate” to earn and apply FSA time credits and would expressly exclude from time-credit eligibility any inmate serving a term of imprisonment only for a conviction for an offense under the law of the District of Columbia. The FSA, however, is ambiguous as to whether those with convictions under the D.C. Code are eligible to apply toward prerelease custody FSA time credits earned through their participation in evidence-based recidivism reduction programs or productive activities, and therefore the Bureau has decided to reopen the comment period in order to ensure that it receives, reviews, and considers comments on this issue.

Potentially relevant statutory provisions include:

- The FSA’s definition of “prisoner” as “a person who has been sentenced to a term of imprisonment pursuant to a conviction for a Federal criminal offense, or a person in the custody of the Bureau of Prisons,” 18 U.S.C. § 3635(4);

- The statement in section 105 of the FSA that nothing in the Act “may be construed to provide authority to place a prisoner in prerelease custody or supervised release who is serving a term of imprisonment pursuant to a conviction for an offense under the laws of one of the 50 States, or of a territory or possession of the United States;”

- The FSA’s identification of certain prisoners as ineligible to receive or apply time credits, including those convicted of certain enumerated, violent federal offenses, 18 U.S.C. 3632(d)(4)(D), and those convicted before the date on which federal parole was abolished, FSA section 102(b)(3);

- The FSA provisions that require the Attorney General to develop and release a risk and needs assessment system that will, among other things, “assess and determine to the extent practicable, the risk of violent or serious misconduct of each prisoner” and “determine when a prisoner is ready to transfer into prerelease custody or supervised release in accordance with section 3624,” and will also “reassess the recidivism risk of each prisoner periodically, based on factors . . . that are dynamic and can reasonably be expected to change while in prison,” and represent an “objective and statistically validated

method through which information is collected and evaluated to determine . . . the risk that a prisoner will recidivate upon release from prison,” 18 U.S.C. 3632(a)(2, 4, 7), 3635(6);

- The FSA’s requirement that the Attorney General, in consultation with the Assistant Director for the Office of Probation and Pretrial Services, issue guidelines for use by the Bureau of Prisons in determining “the appropriate type of prerelease custody or supervised release and level of supervision for a prisoner placed on prerelease custody” and “consequences for a violation of a condition of such prerelease custody by such a prisoner, including a return to prison and a reassessment of evidence-based recidivism risk level under the System,” FSA section 102 (b)(6);

- The D.C. Code’s specification that “felons sentenced pursuant to the D.C. Code” are to be placed in the Bureau’s custody and made subject to federal laws and regulations that are “consistent with the sentence imposed,” D.C. Code section 24-101(b);

- The D.C. Code’s provision that offenders sentenced to imprisonment for felonies committed after August 5, 2000, “may receive good time credit toward service of the sentence only as provided in 18 U.S.C. 3624(b),” D.C. Code section 24-403.01(d);

- The D.C. Code’s specification that those sentenced to imprisonment after August 5, 2000, “for a nonviolent offense may receive up to a one-year reduction” for completing a substance-abuse-treatment program in accordance with 18 U.S.C. 3621(e)(2), D.C. Code section 24-403.01(d-1)(1); and

- The D.C. Code’s provision that certain D.C. Code offenders who committed their crimes before age 25 have an opportunity to be resentenced to a reduced term in accordance with D.C. Code section 24-403.03.

Making D.C. Code offenders eligible to apply time credits would enable some persons with convictions for violent offenses to benefit from the FSA time-credit program when those convicted for similar offenses under federal law would be ineligible. Conversely, making D.C. Code offenders ineligible would prevent some nonviolent offenders from benefiting from that program when those with convictions for similar offenses under federal law would be eligible. Accordingly, the Bureau is

reopening the comment period and will accept comments for an additional 30 days after publication of this notice of proposed rulemaking.

The Bureau is seeking comments only on this issue of whether D.C. Code offenders in the Bureau's custody are eligible to apply time credits under 18 U.S.C. 3632(d)(4) – including the extent to which any of the statutory provisions listed in this notice might affect the ability of some or all D.C. Code offenders to apply time credits – and not on the other contents of the November 25, 2020, proposed rule.

Issued under rulemaking authority vested in the Attorney General in 5 U.S.C. 301; 28 U.S.C. 509, 510 and delegated to the Director, Bureau of Prisons in 28 CFR 0.96.

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Michael D. Carvajal  
Director, Federal Bureau of Prisons

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